(2)

No. 88-264

Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM H. VOGT III,

Petitioner,

—against—

SHELDON ABISH and
MAHONEY, COHEN & CO., P.C.,

Respondents.

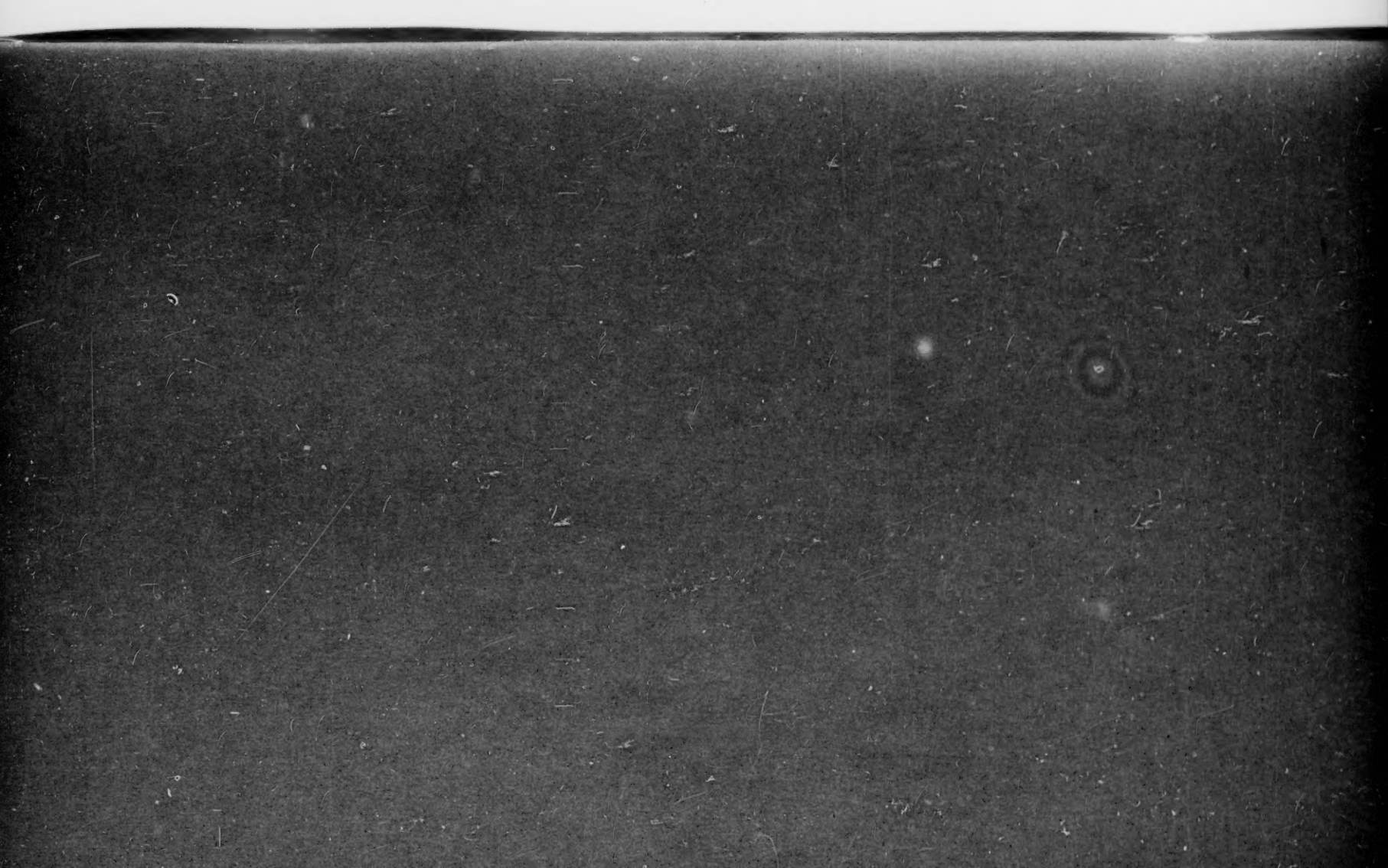
BRIEF FOR RESPONDENT MAHONEY, COHEN & CO., P.C., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM F. PLUNKETT, JR.*
PLUNKETT & JAFFE, P.C.
522 Fifth Avenue
New York, New York 10036
(212) 575-7772

LOUIS STRASSBERG*
STRASSBERG & STRASSBERG, P.C.
Eleven Penn Plaza
New York, New York 10001
(212) 736-9500

**Co-Counsel of Record for Respondent Mahoney, Cohen & Co., P.C.*

Dated: September 9, 1988



QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred in its orders (1) remanding the entire case to the district court for further proceedings as the district court deemed appropriate, and (2) denying petitioner's petition for writ of mandamus.

2. Whether the district court correctly construed the Federal Rules of Civil Procedure in vacating the default judgment against respondent Mahoney, Cohen & Co., P.C., and granting respondent Mahoney, Cohen & Co., P.C. leave to serve responsive pleadings and resolve the petitioner's claims on the merits.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
U.S. SUPREME COURT REVIEW.....	2
STATEMENT OF THE CASE.....	3
A. The Parties.....	3
B. The Underlying Dispute.....	5
C. The Report of Magistrate Tyler, the Decision and Order of the District Court and MCC's Discovery of this Lawsuit.....	9
D. MCC's F.R.Civ.P. 60(b) Motion to Vacate Its Default.....	11
REASONS FOR DENYING THE PETITION...	15
1. Radack and the Exercise of Discretion Pursuant to Rule 60(b).....	20
CONCLUSION.....	27

TABLE OF AUTHORITIES

Page

CASES

Ackermann v. United States,
340 U.S. 193 (1950)..... 23

Carl Marks & Co., Inc. v.
Union of Soviet Socialist
Republics, 665 F.Supp.
323 (S.D.N.Y. 1987)..... 21

Davis v. Musler, 713 F.2d 907
(2d Cir. 1983)..... 24, 25

Dunlop v. Pan American World
Airways, Inc., 672 F.2d 1044
(2d Cir. 1982)..... 21

International Controls Corp v.
Vesco, 556 F.2d 665
(2d Cir. 1977)..... 21, 22

Klapprott v. United States,
335 U.S. 601 (1949)..... 21

Kotlicky v. United States Fidelity
Guaranty Company,
817 F.2d 6 (2d Cir. 1987)..... 23

Matarese v. LeFevre,
901 F.2d 98 (2d Cir. 1986)..... 21

Radack v. Norwegian American
Line Agency, Inc.,
318 F.2d 538 (2d Cir. 1963).... 19-21

United States v. Cerami,
563 F.2d 26 (2d Cir. 1977)..... 22-25

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1..... 17, 18
Rule 4..... 8
Rule 55..... 25
Rule 60..... passim

OTHER

28 U.S.C. 1332(a)..... 6
Federal Practice and Procedure: Civil..... 24
Moore's Federal Practice..... 20
Supreme Court Rule 17..... 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM H. VOGT III,

PETITIONER,

-against-

SHELDON ABISH and
MAHONEY, COHEN & CO., P.C.,

RESPONDENTS.

BRIEF FOR RESPONDENT MAHONEY, COHEN & CO., P.C., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of respondent Mahoney, Cohen & Co., P.C., in opposition to the petition for a writ of certiorari of petitioner William H. Vogt III.

U.S. SUPREME COURT REVIEW

Respondent, Mahoney, Cohen & Co., P.C. (hereinafter "MCC") does not believe that this case warrants the discretionary review of writ of certiorari. At issue is a routine order vacating a default judgment which the Second Circuit has now determined requires a trial de novo. It will be clear that there are no special or important legal issues worthy of this Court's consideration, and that the petition is a frivolous waste of the time and effort of this Court and the parties involved.

STATEMENT OF THE CASE

A. The Parties

VOGT

The petitioner, William H. Vogt III (hereinafter "Vogt") is an attorney-at-law and member of the law firm of Vogt & O'Donnell located in White Plains, New York. He is acting as his own attorney throughout the proceedings. He is formerly a partner of the law firm of Watson, Leavenworth, Kelton & Taggart (hereinafter "WLKT").

ABISH

Respondent Sheldon Abish (hereinafter "Abish") is a former officer, director, and employee of respondent MCC, a certified public accounting firm.

Abish was associated with MCC up until May 28, 1987, the date he resigned.

He was responsible for the handling of the WLKT account at MCC. In 1980, MCC became the liquidator of the WLKT partnership and this action arose from the performance of those services.

Abish was an admitted alcoholic during the fact period in question who has since undergone rehabilitation treatment. It was this illness which was a contributing factor to his failure to notify MCC of the pendency of either this dispute or of the action.

MAHONEY, COHEN & CO., P.C.

Mahoney, Cohen & Co., P.C. is a certified public accounting firm which first learned of the existence of a default judgment against it in May of 1987. It immediately took steps to ascertain the facts, vacate the default and seek resolution of the dispute on the

merits since its investigation revealed that there was at least a partial meritorious defense. The district court agreed with this position.

B. The Underlying Dispute

In the performance of its duties as liquidator of the WLKT partnership in 1980 and 1981, MCC performed various accounting services for WLKT. Certain errors were allegedly committed by Abish in the course of the performance of the accounting services with respect to the distribution of partnership funds to Vogt.

Plaintiff's complaint alleges that a twenty thousand dollar ($20,000.00) distribution error and a six thousand dollar ($6,000.00) distribution error were made to the Vogt account which, in turn, caused certain tax consequences

detrimental to Vogt. MCC has already to the satisfaction of the district court shown that Vogt received the $6000 he claimed he did not receive as a result of an MCC error, which calls into question Vogt's credibility on the other allegations.

It also calls into question whether there is any federal court jurisdiction under 28 U.S.C. 1332(a) since the actual dollar amount in controversy may be less than $10,000. Vogt allegedly made efforts to bring these errors to Abish's attention and requested him to make the necessary corrections to various drawing accounts and tax returns. Vogt asserts that these efforts were unsuccessful and that Abish, in fact, intentionally mislead Vogt into believing that amended tax returns were

filed.

Vogt took no legal action in connection with the alleged errors of Abish and MCC until January, 1985, when Vogt filed a complaint in this action.

The complaint asserts causes of action sounding in breach of contract, accountant negligence, breach of fiduciary duty and fraud. Vogt's complaint also contains a cause of action for an accounting.

Contrary to Vogt's assertion that he tried to avoid suit, Arnold Cohen, a principal of MCC, has stated that neither Vogt nor his representatives contacted Mr. Cohen nor did Vogt ever take any steps during the litigation to make sure that MCC was aware of the suit, even after default.

Service was affected by mail pursuant to F.R.Civ.P. 4(c)(2)(c)(ii) with follow-up personal service upon Abish after no acknowledgment was returned. MCC has denied it ever received service and unsuccessfully raised this defense in the district court.

No appearance was made by either Abish (who ignored the service and concealed the existence of the lawsuit from others at MCC) or MCC (because it had no actual knowledge of this action) and consequently the matter was referred to Magistrate Joel J. Tyler for an inquest to hear and report as to Vogt's money damages. With no appearance in opposition at the inquest, Vogt was awarded both compensatory and punitive damages.

C. The Report of Magistrate Tyler, the Decision and Order of the District Court and MCC's Discovery of this Lawsuit

By report and recommendation filed March 27, 1987, Magistrate Tyler recommended that a money judgment be entered against MCC and Abish in the amount of twenty-eight thousand, five hundred seventy-eight dollars and eighty-two cents ($28,578.82) in compensatory damages, and one hundred fifty thousand dollars ($150,000.00) in punitive damages. At this ex parte hearing, Magistrate Tyler took testimony from Vogt, Paul M. Koren, and Professor Joseph DiBenedetto as accounting experts. Magistrate Tyler rejected the punitive damages theory advanced by Vogt on the $20,000 posting error, finding that Abish's failure to post correctly could not be imputed to MCC.

By decision and order dated May 13, 1987, Chief Judge Charles L. Brieant essentially adopted the report while differing with the Magistrate on Vogt's theory of punitive damages, and disallowing two items of compensatory damages sought by Vogt.

Shortly after the May 13, 1987 decision and order of the district court was filed, an article appeared in The New York Law Journal on Friday, May 22, 1987 discussing this action and Chief Judge Brieant's decision. It was at this time that the principal and majority shareholders of MCC first became aware of this lawsuit. Abish, who was at that time in California, was summoned to MCC's New York office for an explanation of the events that had transpired since 1985. Abish admitted a course of conduct over

a two year period designed to avoid disclosure of the dispute and the existence of this lawsuit and resigned on May 28, 1987.

MCC promptly obtained counsel and moved for an order vacating the default judgment entered after the district court's decision of May 13, 1987.

D. MCC's F.R.Civ.P. 60(b) Motion to Vacate Its Default

By order to show cause dated June 9, 1987, Chief Judge Brieant issued an order directing plaintiff to show cause why an order should not be entered vacating the default judgment entered against MCC due to lack of personal and subject matter jurisdiction and in the interest of justice.

On July 13, 1987, after submission of papers by both sides, Chief Judge

Brieant granted MCC's motion to the extent of setting aside its default and permitting it to interpose its answer. The district court also found that it was appropriate for the judgment to remain in place and stayed any enforcement until the determination on the merits as to any liability on the part of MCC.

MCC interposed an answer pursuant to Court Order which denies many of the allegations of Vogt and cross-claims against Abish.

Subsequent to the decision vacating MCC's default, Abish appeared by counsel and moved to vacate the judgment against him. That motion was denied by the district court by memorandum and order dated July 31, 1987.

Vogt and Abish both subsequently appealed from the district court's

decisions with respect to the motions to vacate the default. MCC filed a cross-appeal. By an order issued February 4, 1988, the Second Circuit Court of Appeals remanded the cross-appeals of all three parties to the district court for clarification while retaining jurisdiction and reserving decision on all issues raised by the appeals.

Thereafter, Chief Judge Brieant issued a memorandum and order dated April 19, 1988 to the Second Circuit. In that memorandum and order, Chief Judge Brieant suggested that the court of appeals,

> "remand the entire case to the District Court for the purpose of entering a new order vacating both orders sought to be appealed from and permitting [Abish] and Mahoney, Cohen & Co., to appear and answer the complaint on the merits and try any genuine issues presented thereby de novo." (See petitioner's appendix to petition for writ of certiorari at page A-77.)

It is clear from this memorandum and order why Chief Judge Brieant found that the interests of justice require a trial de novo on the merits. MCC respectfully refers this Court to pages A-73 through A-77 of Vogt's petition for a full explanation of Chief Judge Brieant's reasons for his order.

Briefly stated, in his memorandum and order Chief Judge Brieant recognizes that Abish's neglect and misconduct caused MCC to be mulcted by Vogt for punitive damages; that the circumstantial evidence shows that Vogt received the $6000; that his refusal to admit it is unreasonable; that it was deposited in his account; that he failed to take proper and reasonable steps to mitigate his damages by filing an amended income tax return; and that these issues should

be tried de novo. The punitive damages award bears no reasonable relationship to the actual loss suffered by Vogt as a result of Abish's deceit.

The court of appeals thereafter remanded the entire case to the district court for such further proceedings as the district court deemed appropriate. [A-1 through A-2] On the same day, the court also denied, without opinion, Vogt's petition for writ of mandamus. [A-3]

REASONS FOR DENYING THE PETITION

The decision below in the court of appeals and the decisions of Chief Judge Brieant in the district court announced no novel rule of law, did not signal a conflict in the circuits, and was in all respects correct.

The decision below was fully consistent with the decisions of the court of appeals on the issue of setting aside the default of MCC and remanding the entire case to the district court for such further proceedings as the district court deemed appropriate. The Second Circuit's decision did not announce a new rule of law, address a question of first impression, signal a conflict in the circuits, or, indeed, implicate any of the other considerations normally warranting review by this Court as set forth in Rule 17 of the United States Supreme Court Rules.

Vogt now claims that the affirmance by the court of appeals of the district court's application of F.R.Civ.P. Rule 60(b) and the sound exercise of discretion by the district

court, given the circumstances embodied in the within action, constitutes grounds for review by this Court.

It is respectfully submitted that the court of appeals did not err in remanding this matter to the district court nor did the court of appeals err in denying Vogt's petition for writ of mandamus. The instant petition for writ of certiorari should be denied.

The stated basis for the remand back to the district court by the court of appeals is the memorandum and order of Chief Judge Brieant. [A-1 through A-2] In the memorandum and order, the district court, seeking to clarify an admitted "procedural morass", rendered a report to the court of appeals recommending remand. In fact, the court refers to Rule 1 of the F.R.Civ.P. and its reminder that all

the rules "shall be construed to serve the just, speedy, and inexpensive determination of every action." [A-76]

Therefore, in response to the circuit court's request for an order of clarification [A-70 through A-72], Chief Judge Brieant suggested remand of the entire case for a de novo treatment of this matter in keeping with the stated goals of Rule 1 and the unique circumstances involved herein. In order to provide Vogt with a generous measure of security in order to protect his rights to the extent he may prevail at trial, Chief Judge Brieant suggested that the judgment, which is far in excess of whatever amount Vogt would reasonably be awarded following trial, remain as security.

The court of appeals then remanded the entire case, thereby adopting the statement by Chief Judge Brieant that it would be appropriate and proper "to seek a practical determination of all controversies on the merit." [A-76]

In furtherance of that practical determination, prior to the appeal the district court found "that Mahoney, Cohen & Co., P.C., may have a meritorious partial defense, and that in the interests of justice it should be permitted to litigate the issues in connection therewith." [A-58] In support of this holding, the court noted the following:

> "The Court relies on Radack in the Second Circuit in 1963, which quote a grand reservoir of equitable power to do justice is said to be available in determining whether to vacate a judgment. And the Court has consistently held this rule

> should be construed freely when substantial justice will be served." [A-47, see transcript of July 13, 1987 hearing, at A-54]

The court's invocation of F.R.Civ.P. Rule 60(b)(6), which states that the court may set aside a judgment for "any other reason justifying relief from the operation of the judgment" represents an equitable and sound exercise of the discretionary authority available to the court in these situations.

1. Radack and the Exercise of Discretion Pursuant to Rule 60(b)(6)

In Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2d Cir. 1963), the court noted that Rule 60(b)(6) "gives the district court a 'grand reservoir of equitable power to do justice in a particular case.' 7 Moore, Federal Practice at p. 308 (1950 ed.),"

and further states that "the rule should be liberally construed when substantial justice will thus be served. Klapprott v. United States, 335 U.S. 601, 615, (1949)." Radack, supra, 318 F.2d at 542. See also Matarese v. LeFevre, 901 F.2d 98, 106 (2d Cir. 1986).

Further, the circuit court in Radack stated that Rule 60(b)(6) is subject "to the proper exercise of discretion by the district court considering all of the circumstances present in a given case." Id., at 543. See also, Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 665 F.Supp. 323, 332-333 (S.D.N.Y. 1987); Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051 (2d Cir. 1982); International Controls Corp. v. Vesco, 556 F.2d 665, 670 (2d Cir. 1977) ("this

discretion is especially broad under subdivision (6)").

Vogt's claims that the district court acted beyond the discretionary parameters of Rule 60(b)(6) are unavailing. The district court's sound exercise of the discretion afforded in Rule 60(b)(6) is not "an unexplained departure from [a] long line of holdings" as Vogt has stated.

On the contrary, the cases cited by Vogt in the instant petition lend support to the holding by the district court and subsequent remand by the court of appeals rather than represent an unexplained departure.

Vogt's reliance on United States v. Cerami, 563 F.2d 26 (2d Cir. 1977), is misplaced. In Cerami, supra, the circuit court notes the "extraordinary

circumstances" standard in Ackermann v. United States, 340 U.S. 193, 199 (1950), and goes on to grant the requested Rule 60(b)(6) relief in a tax dispute. In reaching that conclusion, the court noted the policy considerations applicable in vacating a judgment and stated, "we are not unmindful of other interests, among them the interest in deciding cases on their merits. These interests provide relevant parameters within which to evaluate Rule 60(b) motions; the facts give them values." (emphasis added) Cerami, 563 F.2d at 33. See also Kotlicky v. U.S. Fidelity & Guaranty Company, 817 F.2d 6, 9 (2d Cir. 1987).

This analysis was restated in the conclusion which is directly applicable to the issues herein:

> "Where one timely seeking Rule 60(b)(6) relief from a default judgment can make out a strong case

> that he had a meritorious defense which could have been asserted but for a truly extraordinary turn of events not covered by the first five clauses of the rule and which brought about his default and resulted in substantial injustice to him, it is appropriate to vacate the judgment so that the merits of his case can be considered." Id. at 35.

Davis v. Musler, 713 F.2d 907 (2d Cir. 1983), also cited by Vogt, reiterates the scope of the discretion afforded to district court in motions to vacate judgments. Citing Federal Practice and Procedure: Civil, §2693 at 471-93 (1983), the court commented that it is:

> "the trial judge, who is usually 'the person most familiar with the circumstances of the case and is in the best position to evaluate the good faith and credibility of the parties,' id. at 475, [and] is entrusted with the task of balancing these competing considerations." Davis, supra, 713 F.2d at 912.

With that guideline in place, the court then went on to decide the issue with an

analysis rooted in the facts, vacating the judgment.

Both Cerami and Davis serve to affirm the sound exercise of discretion by Chief Judge Brieant, given the unique factual situations presented, rather than exceed some murky guideline that Vogt claims exists.

Additionally, Vogt's references to Rule 55(b) and its supposed more lenient "good cause shown" standard, along with references to the case law construing that standard, are inapplicable in a consideration of the setting aside of the default judgment as to MCC pursuant to 60(b)(6) and its subsequent remand by the court of appeals.

The strongest support for the exercise of discretion by Chief Judge

Brieant can be found in the remand by the court of appeals. Surely, in light of the memorandum and order dated April 19, 1988, with its clear suggestions and stated intent, the court of appeals would not remand a matter in order to facilitate an abuse of discretion. The silence of the court of appeals in this regard speaks volumes.

It is respectfully submitted that the exercise of discretion by the district court in vacating the default as to MCC in the interest of justice was entirely proper as was the court of appeals' remand back to the district for further proceedings. It follows, therefore, that the denial of Vogt's petition for writ of mandamus was also proper.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for certiorari must be denied.

Respectfully submitted,

WILLIAM F. PLUNKETT, JR.*
Plunkett & Jaffe, P.C.
522 Fifth Avenue
New York, New York 10036
(212)575-7772

LOUIS STRASSBERG*
Strassberg & Strassberg, P.C.
Eleven Penn Plaza
New York, New York 10001
(212) 736-9500

* Co-Counsel of Record
for Respondent
Mahoney, Cohen, & Co., P.C.